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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

No. 289

DAVID V. LANSDEN et al., Petitioners,

vs.

WILLIAM W. HART, as United States Attorney for the Eastern District of Illinois, et al., Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit
and

BRIEF IN SUPPORT OF PETITION.

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INDEX.

Page

Subject Index.

Petition for writ of certiorari.....1–19
Statement of the matter involved..... 2
Basis of this Court's jurisdiction..... 10
Questions presented 11
Reasons relied on for allowance of writ..... 14
Prayer for writ..... 18
Brief in support of petition.....21–32
Opinions below 21
Jurisdiction 22
Statement of the case..... 22
Specification of errors 23
Argument 25
Appendix A—Presidential Proclamation 2739..... 33
Appendix B—Notice of proposed rule making..... 38
Appendix C—Presidential Proclamation 2748..... 40
Appendix D—Governor's Proclamation, State of Illinois, Executive Department..... 42

Cases Cited.

American Express Co. v. People, 133 Ill. 649..... 26
Benton v. Marr, 364 Ill. 628.....18, 32
Brandenburg v. Doyle, 12 F. Supp. 342..... 27
C. & S. Air Lines v. Waterman S. S. Corp., ... U. S. ..., 92 L. Ed. 367.....16, 29
Cerritos Gun Club v. Hall, 96 F. 2d 620, 622, C. C. A. 9 .....14, 25
Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. Ed. 1027 31
Federal Trade Commission v. Bunte Bros., 312 U. S. 349, 85 L. Ed. 881, 884..... 28

Geer v. Connecticut, 161 U. S. 519, 40 L. Ed. 793..... 26
Grattan v. Ahlberg Bearing Co., 373 Ill. 455..... 18
Gratz v. McKee, 270 F. 713, 718-720, C. C. A. 8..... 26
Gratz v. McKee, 260 U. S. 127, 67 L. Ed. 167..... 26
Kennedy v. Silas Mason Co., 334 U. S. ..., 92 L. Ed. 989 .....17, 30
Magner v. People, 97 Ill. 320..... 26
Missouri v. Holland, 252 U. S. 416, 64 L. Ed. 641....15, 27
Morgan v. U. S., 298 U. S. 468, 80 L. Ed. 1288.....18, 31
Packard v. Banton, 264 U. S. 140, 145, 68 L. Ed. 596, 608 .....15, 26
Price v. Johnston, 334 U. S. ..., 92 L. Ed. 993.....18, 30
Schulte v. Warren, 218 Ill. 108.....15, 26
Swan Island Club, Inc., v. Ansell, 51 F. 2d 337, C. C. A. 4 .....14, 25
Takahashi v. Fish and Game Commission, ... U. S. ...; 92 L. Ed. 1096..... 26
Toomer v. Witsell, ... U. S. ..., 92 L. Ed. 1131..... 26

Statutes Cited.

Administrative Procedure Act, 5 U. S. C. 1001 et seq. 3, 5, 6, 8, 10, 12, 16, 24, 29
Federal Register Act, Sec. 8, 44 U. S. C. 308....5, 18, 24, 30
Game Code of Illinois, Sec. 3 D, Ill. Rev. Stat. 1947, Chap. 61, Sec. 137..... 5
Game Code of Illinois, Sec. 4, Ill. Rev. Stat. 1947, Chap. 61, Sec. 138 .....5, 32
Game Code of Illinois, Sec. 5, Ill. Rev. Stat. 1947, Chap. 61, Sec. 139 5
Game Code of Illinois, Sec. 31, as amended by Act of July 21, 1947, Ill. Rev. Stat. 1947, Chap. 61, Sec. 165 32
Governor's Proclamation (Illinois), Oct. 2, 1947 (see Appendix D) 9, 31, 42
Illinois Constitution, Art. II, Sec. 2.....14, 32
Migratory Bird Treaty Act, 16 U. S. C. 703 et seq. 4, 5, 12, 13, 16, 23, 28
Nathanson: Some Comments on the Administrative Procedure Act, 41 Ill. L. Rev. 368..... 29

Notice of Proposed Rule Making, 12 F. R. 6273 et seq., see Appendix B 6, 38
Notice of Proposed Rule Making, 13 F. R. 1191..... 31
Presidential Proclamation 2245, 2 F. R. 1355 et seq. 27
Presidential Proclamation 2345, 4 F. R. 3621 et seq. 27
Presidential Proclamation 2616, 9 F. R. 9873 et seq. 27
Presidential Proclamation 2739, 12 F. R. 5269, see Appendix A 5, 6, 8, 10, 12, 27, 33
Presidential Proclamation 2748, 12 F. R. 6521 et seq., see Appendix C 3, 6, 8, 10, 11, 14, 24, 27, 28, 30, 31, 40
Presidential Proclamation 2801, 13 F. R. 4411 et seq. 6, 12, 27, 28
United States Constitution, 5th Amendment..... 14, 31
United States Constitution, 14th Amendment..... 14, 31

IN THE

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WILLIAM W. HART, as United States Attorney for the Eastern District of Illinois, et al., Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Your petitioners, David V. Lansden, John A. Lansden, Robert L. Lansden, Charles Sickman, Kenneth L. Martin, Joseph A. Regenstein, Jr., Paul L. Ryal, Lee P. Stenzel, Gertrude Stenzel, Beatrice S. Rolwing and Frank Pettit, respectfully present their petition for the issuance of a

writ of certiorari directed to the United States Court of Appeals for the Seventh Circuit and show to this Honorable Court the following:

I.

STATEMENT OF THE MATTER INVOLVED.

This action was brought in the District Court of the United States for the Eastern District of Illinois by petitioners, who are landowners and hunting club owners, managers or operators, to enjoin respondents, who are Federal and State law enforcement officials, from enforcing the provisions of Presidential Proclamation 2748 and a Proclamation of the Governor of the State of Illinois, both dated October 1, 1947. Such proclamations permanently closed an area of approximately 20,000 acres in Alexander County, Illinois, to the hunting of all species of wild geese. The hunting lands involved in the case are all privately owned and wholly within said closed area.

Petitioners' motion for preliminary injunction was denied after hearing on November 13, 1947. Appeal from the denial of the preliminary injunction was taken to the United States Court of Appeals for the Seventh Circuit pursuant to old 28 U. S. C., Sec. 227, now in substance found at new 28 U. S. C., Sec. 1292, which permits an appeal to a Court of Appeals from the denial of a motion for preliminary injunction.

On May 5, 1948, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court. Within time allowed, petitioners filed a petition for rehearing, which petition was, on June 23, 1948, denied. Thereupon the judgment of the Court of Appeals became final.

Most of the facts, and some of the statements that can be considered as legal conclusions, alleged in the complaint (R. 3-21) were admitted by stipulation at the hearing on the motion for preliminary injunction (R. 27-28). The stipulation in large part limited the case to legal rather than factual questions.

The admitted and conceded basis of jurisdiction in the District Court was that the matter in controversy arose under the Constitution or laws of the United States or treaties made or which shall be made under their authority (R. 4). 28 U. S. C., Sec. 41 (1)—old title; 28 U. S. C., Sec. 1331—new title. That the jurisdictional amount was involved was conceded except as to petitioners Stenzels.

Petitioners also alleged that they are persons who have suffered legal wrong because of agency action and were adversely affected and aggrieved by such action within the meaning of Section 10 of Administrative Procedure Act, 5 U. S. C., Sec. 1009, and as such and by virtue of such cited section were entitled to judicial review of Presidential Proclamation 2748 in an action seeking injunction. Such allegations were necessary because, even with the admitted and conceded basis of jurisdiction, petitioners might have been without a remedy unless judicial review of Presidential Proclamation 2748 could be had. Because petitioners Stenzels specifically alleged (R. 11) that the sum of $3,000.00 was not involved in their portion of the action, a decision was required as to the necessity of jurisdictional amount in judicial review of proceedings pursuant to Section 10 of the Administrative Procedure Act, 5 U. S. C., Sec. 1009.

The petitioners Lansdens, Regenstein and Rolwing are landowners upon whose lands hunting facilities have been developed over a period of years for the taking of migratory waterfowl, principally and almost exclusively geese.

Heavy capital investments have been made in the development of such facilities. Such five petitioners operated hunting clubs as businesses, charging hunters daily hunting fees, and such businesses were flourishing and profitable (R. 6-12).

Petitioners Sickman, Martin, Ryal and Pettit were tenants on the above lands, operated the hunting clubs, and shared in the receipts from the hunting on the farms. Their shares in the hunting receipts constituted for such petitioners one of their principal sources of livelihood (R. 6-12).

Petitioners Stenzels own lands which have been developed and used by them for hunting (R. 11).

It is conceded that the enforcement of Presidential Proclamation 2748 and the Proclamation of the Governor of Illinois will virtually destroy the value of petitioners' hunting enterprises (R. 12).

All of the lands involved in this case are wholly within the closed area (R. 6, 8, 9, 11), and such closed area surrounds a game preserve of approximately 3,544 acres of land and water wholly owned and controlled by the State of Illinois, known as Horse Shoe Lake State Game Preserve (R. 6).

There is no land owned or controlled by the United States adjacent or contiguous to the Horse Shoe Lake State Game Preserve, and in the closed area and in Alexander County, Illinois, there is no area of the United States set aside by the United States as a bird, game or other wild life reservation, breeding ground or refuge (R. 6).

Respondents are Federal and State prosecutors and game wardens (R. 3-4), charged with the enforcement in Alexander County, Illinois, of the Migratory Bird Treaty

Act, 16 U. S. C., Sec. 703 et seq., and regulations made thereunder. Under the Game Code of Illinois, Ill. Rev. Stat., Chap. 61, Secs. 137, 139, 165, the Federal and State officials can enforce both the Federal and State laws.

It is conceded that the respondent game wardens are enforcing the proclamations and that respondents Hart and Berbling, as United States Attorney for the Eastern District of Illinois, and State's Attorney of Alexander County, Illinois, respectively, will prosecute any violations of the proclamations brought to their attention (R. 15, 27-28).

In the United States, migratory waterfowl, which include all species of wild geese, can be hunted only as permitted by regulations issued pursuant to the Migratory Bird Treaty Act, as amended, 16 U. S. C., Section 703, et seq. (R. 32). In connection with the regulations issued pursuant to said Migratory Bird Treaty Act, the Fish and Wildlife Service of the Department of the Interior collects all the data, information and facts and submits to the Secretary of the Interior a proposed regulation to govern the hunting of migratory waterfowl. After signing by the Secretary transmits such regulations to the President for approval. Changes are made in the regulations annually. The Fish and Wildlife Service also has the duty to enforce all regulations or proclamations relating to migratory waterfowl (R. 11-12).

In 1947, after notice and public procedure, pursuant to Section 4 of the Administrative Procedure Act, 5 U. S. C. Section 1003, Proclamation 2739, dated July 31, 1947, was published in the Federal Register on August 2, 1947, 12 F. R. 5269, 5271-5273. Said Proclamation 2739 made it legal to take geese in Alexander County from 12 noon on November 4, 1947, up to and including December 3, 1947, in the numbers and under the conditions prescribed in

Proclamation 2739, and made no special reference to Alexander County, nor were the conditions of the hunting of geese in any way different from those prescribed for the rest of the State of Illinois (R. 12). (The applicable portions of Presidential Proclamation 2739 are printed at the end of the supporting brief as Appendix "A".)

Petitioners or their attorneys or agents participated in the public procedure, hereinabove referred to, prior to June 1, 1947, and the facts concerning the hunting of geese in Alexander County were presented or attempted to be presented at meetings called by the Fish and Wildlife Service of the Department of the Interior in Chicago, Illinois, San Francisco, California, and St Louis, Missouri (R. 12).

Petitioners admit that Proclamation 2739 is legal and valid, and by said Proclamation 2739, these petitioners could use their premises for hunting any species of wild geese in accordance with the regulations therein prescribed for the 1947 hunting season (R. 12).

(For the information of this Court, in 1948, after notice and public procedure, pursuant to Section 4 of the Administrative Procedure Act, 5 U. S. C., Sec. 1003, Presidential Proclamation 2801, dated July 29, 1948, was published in the Federal Register on July 31, 1948, 13 F. R. 4411, 4413-4416. Said Proclamation 2801 established the migratory waterfowl hunting regulations for the 1948 season, and wild geese can be hunted under said Proclamation 2801 in all of the State of Illinois except the closed area established by Proclamation 2748, which is referred to in a footnote in Proclamation 2801.)

On September 19, 1947, there was published in the Federal Register, 12 F. R. 6273-6274, a notice of the Department of the Interior of intention to adopt amendments to the

regulations as last amended by Proclamation 2739, which amendments would prohibit the hunting of geese in Alexander County, Illinois, in the immediate vicinity of Horse Shoe Lake. Such amendments were to take effect on November 3, 1947, and were to continue in effect thereafter until further notice. Interested persons, in accordance with such notice, were given an opportunity to participate in preparing the regulations for issuance as set forth in such notice by submitting their views, data, or arguments in writing to Albert M. Day, Director, Fish and Wildlife Service, Washington, D. C. (R. 12). (Said notice is printed at the end of the supporting brief as Appendix "B".)

On September 19, 1947, petitioner, Robert L. Lansden, called at the offices of the Fish and Wildlife Service in Chicago, Illinois, and at that time was informed by W. E. Crouch, Chief of the Game Management Division of the Fish and Wildlife Service, of the content of said notice referred to in the preceeding paragraph. Said Robert L. Lansden then and there requested of Crouch that petitioners, Lansdens, and all other persons in Alexander County who might care to appear, be granted a hearing on said proposed regulation (R. 13).

On September 23, 1947, at approximately 9:45 A. M., said Crouch by long-distance telephone informed petitioners, David V. Lansden and Robert L. Lansden, that said Albert M. Day, Director, Fish and Wildlife Service, had granted the request made by Robert L. Lansden at Chicago on September 19, 1947, and that said Day would hold the hearing in Chicago at the offices of the Fish and Wildlife Service, commencing at approximately 1:30 P. M. on September 30, 1947 (R. 13).

On September 30, 1947, petitioners, David V. Lansden and Robert L. Lansden, and petitioner, Regenstein, appeared in person at said hearing, and Robert L. Lansden

appeared at said hearing as attorney for all other petitioners and as attorney for certain other persons, organizations and municipal corporations. At said hearing the views, data and arguments of the aforementioned persons were submitted partially in writing and the remainder orally, which oral statements were taken down by a shorthand reporter and later transcribed, mimeographed and mailed to some of the petitioners on October 16, 1947, and were received by such petitioners on October 20, 1947 (R. 13).

On October 3, 1947, Proclamation 2748 was published in the Federal Register, 12 F. R. 6521, 6523, and this is conceded to be final agency action within the meaning of the Administrative Procedure Act, 5 U. S. C., Sec. 1001 et seq. (R. 6). Said Proclamation 2748 was approved and signed by the President on October 1, 1947, the day after said hearing was held in Chicago. The regulation, upon which proclamation 2748 was based, was signed by the Secretary of the Interior on September 25, 1947, **which was five days before said hearing was held** in Chicago and which was two days after said W. F. Crouch informed petitioners, David V. Lansden and Robert L. Lansden, that said hearing would be held in Chicago on September 30, 1947. Only six days elapsed from the date of said notice of proposed rule making on September 19, 1947, until the date of September 25, 1947, when the Secretary of the Interior signed the proposed regulation, and only eleven days elapsed from the publication of notice to approval by the President. (Said Proclamation 2748 is printed at the end of the supporting brief as Appendix "C".)

On October 1, 1947, the same date on which the President signed Proclamation 2748, the Governor of the State of Illinois signed a proclamation which attempted to establish a closed area identical and coterminous with the closed area described in Proclamation 2748. The legal

descriptions in both of the proclamations are identical as to words and figures. The proclamation by the Governor was filed in the office of the Secretary of State of Illinois on October 2, 1947. (Said Governor's Proclamation is printed at the end of the supporting brief as Appendix "D".)

None of the petitioners ever received a notice of the contemplated action by the Governor of the State of Illinois, and no hearing was ever held in connection with such proclamation (R. 49, 51-52).

On either September 27 or 29, 1947, a petition on behalf of petitioners and other persons and organizations was presented to the Secretary of the Interior requesting that a total kill of 5,000 geese be permitted in Alexander County, Illinois (R. 41-42, 54). The final action denying this petition was not taken until subsequent to the date of Proclamation 2748 (R. 46-47, 54). No petition to modify Proclamation 2748 has ever been filed in the office of the Secretary of the Interior (R. 42).

Numerous conferences were held in the Department of the Interior relating to the hunting of geese in the area surrounding Horse Shoe Lake, and such conferences were held both prior and subsequent to the date of Proclamation 2739, and at such conferences was discussed the data received by the Department of the Interior from its agents and from the Department of Conservation of the State of Illinois (R. 32-38).

At the conferences held during the summer of 1947, it was determined that there would be a simultaneous closure of the area involved in this case by both Federal and State Proclamations, and the mechanics of the simultaneous closure were not worked out until after the date of Proclamation 2739 (R. 37).

At the hearing held in Chicago on September 30, 1947, Albert M. Day, Director of the Fish and Wildlife Service, presided only part of the time and was out of the room the remainder of the time, and in his absence W. E. Crouch, Chief of the Game Management Division of the Fish and Wildlife Service, presided. Day was absent from the conference room where the hearing was held for at least one hour. The hearing commenced about 1:30 in the afternoon and ended about 4:30 (R. 50-51).

The Chief Counsel of the Fish and Wildlife Service communicated with Albert M. Day prior to the hearing on September 30, 1947, by telephone from Washington and communicated with other officials of Fish and Wildlife Service who were at the hearing subsequent to the hearing (R. 39, 45) and was informed of what had occurred at the hearing. The Chief Counsel informed the Secretary of what had transpired at Chicago because the Chief Counsel was holding Proclamation 2748 as signed on September 25, 1947, by the Secretary of the Interior for transmittal to the President on October 1, 1947, for his signature and approval (R. 38-39, 45).

It was the opinion of the Chief Counsel of the Fish and Wildlife Service that the adoption of Presidential Proclamation 2739 and 2748 was not governed by the Administrative Procedure Act, 5 U. S. C., Sec. 1001 et seq. (R. 43-44).

II.

BASIS OF THIS COURT'S JURISDICTION.

The date of the judgment of the Court of Appeals for the Seventh Circuit was May 5, 1948, and the date when said judgment became final, on the denial of petitioners' petition for rehearing was June 23, 1948. The date of this

application for a writ of certiorari may be taken as the date of the filing of the petition in the office of the Clerk of this Court.

Between the date said judgment became final and the date of this application for a writ of certiorari, former Title 28 of the U. S. Code entitled "Judicial Code and Judiciary" was revised, codified and enacted into law as Title 28 of the U. S. Code entitled "Judiciary and Judicial Procedure," which latter enactment took effect on September 1, 1948. Such latter enactment does not affect the jurisdiction of this Court in so far as this application is concerned, nor have any of petitioners' rights been lost thereby [Sec. 2 (b) of the Act of June 25, 1948].

This Court has jurisdiction to review by certiorari the judgment of the Court of Appeals for the Seventh Circuit by reason of 28 U. S. C., Sec. 347 (old title), and 28 U. S. C., Sec. 1254 (new title). The jurisdiction of this Court is invoked under such sections and under Rule 38 of the Rules of the Supreme Court of the United States.

The time in which this application must be made is, under the old title, three months (28 U. S. C. 350), and, under the new title, ninety days [28 U. S. C. 2101 (c)]. Said Rule 38 sets forth what constitutes filing the petition in time.

III.

QUESTIONS PRESENTED.

The questions presented as to Presidential Proclamation 2748 are as follows:

1. Whether any property rights of petitioners are involved in this action.

2. Whether petitioners' rights to use their lands for hunting and to conduct hunting club businesses, subject to valid governmental regulation, can be protected by injunction.

3. Whether under the Migratory Bird Treaty Act, 16 U. S. C., Sec. 704, a permanently closed area can be established.

4. Whether the standards required to be followed in the adoption of regulations under the Migratory Bird Treaty Act, 16 U. S. C. 704, can be applied to an area of only 20,000 acres.

5. Whether, in view of former regulation 4 under the Migratory Bird Treaty Act, 16 U. S. C., Sec. 704, which prohibits the hunting of migratory waterfowl on Migratory Bird Conservation Act refuges or "any area of the United States set aside under any other law, proclamation or Executive order for use as a bird, game or other wildlife reservation, breeding ground or refuge except so far as may be permitted by the Secretary of the Interior under existing law, or on any area adjacent to any such refuge when such area is designated as a closed area under the Migratory Bird Treaty Act," a closed area can be established on privately owned land not adjacent to a federal refuge.

6. Whether a long continued and uniform construction of a statute by a department of government charged with its execution is entitled to great weight, and whether such construction should be continued without change and not broadened. (Regulation 4 in Proclamation 2739—Appendix "A"—Cf. Regulation 1.4 in Proclamation 2801—13 F. R. 4413.)

7. Whether any foreign affairs functions of the Federal Government are involved in the execution of the Migra-

tory Bird Treaty Act, 16 U. S. C., Sec. 703 et seq. and the regulations made pursuant thereto.

8. Whether the rule making provisions of Section 4 of the Administrative Procedure Act, 5 U. S. C., Sec. 1003, govern the adoption of regulations under the Migratory Bird Treaty Act, 16 U. S. C., Sec. 704.

9. If the answer to the preceding question is in the affirmative, whether the rule making provisions of Section 4 of the Administrative Act, 5 U. S. C., Sec. 1003, were complied with as regards Presidential Proclamation 2748.

10. Whether, as regards Presidential Proclamation 2748, petitioners are persons who have suffered legal wrong because of agency action or are adversely affected or aggrieved by such action within the meaning of Section 10 of the Administrative Procedure Act, 5 U. S. C., Sec. 1009, and are, therefore, entitled to judicial review under said Section 10 as provided therein. (It is conceded by petitioners and respondents that Presidential Proclamation 2748 is final agency action within the meaning of said Section 10 [R. 5].)

11. Whether Section 10 of the Administrative Procedure Act, 5 U. S. C., Sec. 1009, has impliedly dispensed with the necessity of any jurisdictional amount being involved in judicial review proceedings thereunder.

12. Whether, irrespective of Section 10 of the Administrative Procedure Act, 5 U. S. C., Sec. 1009, petitioners are entitled to judicial review of Presidential Proclamation 2748.

13. Whether, without having any evidence relating to such issue, the District Court could find and determine that Presidential Proclamation 2748 was reasonable and not arbitrary.

14. Whether, as regards Presidential Proclamation 2748, Section 8 of the Federal Register Act, 44 U. S. C., Sec. 308, was complied with.

15. Whether petitioners have been afforded due process of law under Constitution of the United States as regards Presidential Proclamation 2748.

The questions presented as to the Proclamation of the Governor of the State of Illinois are as follows:

1. Whether, in view of the manner in which such proclamation was adopted, petitioners have been afforded due process of law under the Constitution of the United States.

2. Whether, in view of the manner in which such proclamation was adopted, petitioners have been afforded due process of law under the Constitution of the State of Illinois.

IV.

REASONS ~~ERRORS~~ RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The last paragraph of the opinion of the Court of Appeals for the Seventh Circuit holds that no property rights of petitioners are involved in this action. Such holding is in conflict with decisions of the Courts of Appeals for the Fourth and Ninth Circuits.

Swan Island Club, Inc., v. Ansell, 51 F. 2d 337, C. C. A. 4;

Cerritos Gun Club v. Hall, 96 F. 2d 620, C. C. A. 9.

2. The last paragraph of the opinion of the Court of Appeals for the Seventh Circuit, by holding that no property rights of petitioners are involved in this action, has in effect decided that petitioners' rights to use their lands

for hunting and to conduct hunting club businesses, subject to valid governmental regulation, are not property rights. Such holding conflicts with the decisions of the Supreme Court of Illinois and of this Court.

Schulte v. Warren, 218 Ill. 108;
Packard v. Banton, 264 U. S. 140, 68 L. ed. 596.

3. Without discussion, the Court of Appeals for the Seventh Circuit decided that Presidential Proclamation 2748 establishing the closed area was a proper exercise of administrative discretion vested in the Secretary of the Interior. Whether, under the Migratory Bird Treaty Act, 16 U. S. C., Sec. 704, any permanently closed area can be established or whether the standards required by said act to be followed can be applied to an area of only 20,000 acres, are both important federal questions, the decision of which will determine some of the limits of the power granted to the Secretary of the Interior. Such questions have never been passed upon by this Court but should be, and the only occasion this Court has ever had to construe the Migratory Bird Treaty Act was in the case upholding its constitutionality, Missouri v. Holland, 252 U. S. 416, 64 L. ed. 641, decided in 1920. This phase of the present case is unique and novel.

4. Presented to the Court of Appeals for the Seventh Circuit but not decided nor discussed by it in its opinion was the question whether, under the regulation relating to closed areas, a closed area could be established on privately owned land not adjacent to a Federal refuge. For over ten years prior to Presidential Proclamation 2748, such regulation had uniformly contained the statement, in substance, that a closed area could be established on privately owned land only if such land were adjacent to a Federal refuge. A decision as to whether Presidential Proclamation 2748 was authorized by such regulation was

not specifically decided by the Court of Appeals for the Seventh Circuit but was impliedly decided by the Court's holding that Presidential Proclamation 2748 was a proper exercise of administrative discretion.

Whether the Secretary of the Interior is bound by his long continued and uniform construction of the Migratory Bird Treaty Act in so far as such construction relates to closed areas is a Federal question, the decision of which will define the limits of the power granted to the Secretary of the Interior under the Migratory Bird Treaty Act, 16 U. S. C., Sec. 704.

5. The Court of Appeals for the Seventh Circuit did not decide, but the District Court seemed to feel that the regulation of migratory waterfowl involved some foreign affairs functions of the United States. Whether such foreign affairs functions are legally involved is of considerable importance on the question of judicial review of Presidential Proclamation 2748. Cf. C. & S. Air Lines v. Waterman S. S. Corp., ... U. S. ..., 92 L. Ed. 367.

6. So far as petitioners have been able to ascertain, this Court has never been called upon to construe any portions of Sections 4 or 10 of the Administrative Procedure Act, 5 U. S. C., Secs. 1003 and 1009. This statute is considered by many Federal practitioners to be one of the most important Congressional enactments in recent years, and the interpretation to be given to such statute will vitally affect the relations of all citizens of the United States to their government. The Court of Appeals for the Seventh Circuit decided that none of the provisions of the Administrative Procedure Act had been violated in the adoption of Presidential Proclamation 2748, yet the undisputed facts in this case show that the Secretary of the Interior acted before the hearing granted petitioners was held and with-

out consideration of petitioners' views, arguments and data on the proposed closed area. The opinion of the Court of Appeals for the Seventh Circuit is silent on the question of whether petitioners are entitled to judicial review under the Administrative Procedure Act, but petitioners, Stenzels, should not be parties to this action unless Section 10 of said Act has impliedly dispensed with the necessity of any jurisdictional amount being involved in judicial review proceedings under said section.

The testimony of the chief counsel of the Fish and Wildlife Service (R. 43-44) categorically discloses that such agency is trying to escape the requirements of the Administrative Procedure Act.

This Court should decide all questions presented in this case that relate to the Administrative Procedure Act and settle them to prevent confusion and conflict in the lower Federal courts.

7. Another important question, which should be decided by this Court but which was not decided by the lower courts was whether, irrespective of Section 10 of the Administrative Procedure Act, 5 U. S. C., Sec. 1009, petitioners are entitled to judicial review of Presidential Proclamation 2748. Before this Court is, therefore, the question of whether Section 10 is the exclusive basis of judicial review of agency action other than that specifically provided for in specific statutes.

8. Both the District Court and the Court of Appeals for the Seventh Circuit found and decided that Presidential Proclamation 2748 was reasonable. No evidence was introduced at the hearing on the motion for preliminary injunction on such issue, and a finding and holding without evidence in the record to determine such vital question has been disapproved by this Court in **Kennedy v. Silas Mason**

Co., 334 U. S. ..., 92 L. Ed. 989; **Price v. Johnston**, 334 U. S. ..., 92 L. Ed. 993.

9. Section 8 of the Federal Register Act, 44 U. S. C., Sec. 308, has never been construed by this Court, and whether there was compliance with said section as regards Presidential Proclamation 2748 was not determined by the District Court or the Court of Appeals for the Seventh Circuit. This Court should decide whether said section really means anything or whether said section is of little importance to the administrative process.

10. The essentials of due process of law under the Constitutions of the United States and the State of Illinois are notice and an opportunity to be heard. Both the District Court and the Court of Appeals for the Seventh Circuit have impliedly held, without discussion, that petitioners were not denied due process of law as regards both proclamations involved in this case, and such implied holdings conflict with decisions of this Court and the Supreme Court of Illinois. **Morgan v. U. S.**, 298 U S. 468, 80 L. Ed. 1288; **Coe v. Armour Fertilizer Works**, 237 U. S. 413, 59 L. Ed. 1027; **Grattan v. Ahlberg Bearing Co.**, 373 Ill. 455; **Benton v. Marr**, 364 Ill. 628.

The foregoing reasons cover all of the reasons appearing in paragraph 5 (b) of Rule 38 of this Court, any one of which could well be sufficient for this Court to grant the prayer of this petition.

PRAYER.

Your petitioners therefore respectfully pray that a writ of certiorari be issued out of this Honorable Court, commanding the United States Court of Appeals for the Seventh Circuit to certify and send to this Court a com-

plete transcript of the record and all proceedings in said Court of Appeals in this cause entitled "No. 9553, David V. Lansden et al., Plaintiffs-Appellants, v. William W. Hart, as United States Attorney for the Eastern District of Illinois et al., Defendants-Appellees," to the end that this cause may be reviewed by this Honorable Court, and that said judgment of the Court of Appeals be reversed, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and proper.

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ROBERT L. LANSDEN,
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Cairo, Illinois,

Counsel for Petitioners not appearing Pro Se.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

No. .....

DAVID V. LANSDEN et al., Petitioners,

vs.

WILLIAM W. HART, as United States Attorney for the Eastern District of Illinois, et al., Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The opinion of the District Court has not been officially reported, but the oral opinion of the District Court announced at the time of the denial of the motion for preliminary injunction is found at R. 55-59.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 168 F. 2d 409-412.

II.

GROUNDS UPON WHICH JURISDICTION IS INVOKED.

A statement of the grounds on which the jurisdiction of this Court is invoked appears in the petition for writ of certiorari under the heading "Basis of This Court's Jurisdiction," and is, therefore, not repeated here.

III.

STATEMENT OF THE CASE.

A statement of the case containing all that is deemed material to the consideration of the questions presented with appropriate page references to the record appears in the petition for writ of certiorari under the heading "Statement of the Matter Involved," to which reference is hereby respectfully made.

IV.

SPECIFICATION OF ERRORS.

The Court of Appeals for the Seventh Circuit erred in each of the following respects:

1. In affirming the judgment of the District Court.

2. In holding that no property rights of petitioners are involved in this action.

3. In ruling that a permanently closed area can be established under the Migratory Bird Treaty Act, 16 U. S. C., Sec. 704.

4. In holding, in effect, that the standards required to be followed in the adoption of regulations under the Migratory Bird Treaty Act, 16 U. S. C., Sec. 704, can be applied to an area of only 20,000 acres.

5. In holding that a closed area can be established on privately owned land not adjacent to a federal refuge.

6. In refusing to decide whether a long continued and uniform construction of a statute by a department of government charged with its execution is binding on such agency.

7. In failing to decide whether foreign affairs functions were or were not involved in the execution of the Migratory Bird Treaty Act, 16 U. S. C., Sec. 703 et seq., and the regulations made pursuant thereto.

8. In deciding that the rule making provisions of Section 4 of the Administrative Procedure Act, 5 U. S. C., Sec. 1103, were complied with.

9. In refusing to hold that petitioners are persons who have suffered legal wrong because of agency action or are

adversely affected or aggrieved by such action within the meaning of Section 10 of the Administrative Procedure Act, 5 U. S. C., Sec. 1009.

10. In refusing to hold that petitioners are entitled to judicial review under said Section 10 of the Administrative Procedure Act.

11. In failing to decide whether Section 10 of the Administrative Procedure Act has dispensed with the necessity of any jurisdictional amount being involved in judicial review proceedings thereunder.

12. In failing to decide whether petitioners are entitled to judicial review of Presidential Proclamation 2748, irrespective of said Section 10 of the Administrative Procedure Act.

13. In deciding the "reasonableness" of Presidential Proclamation 2748 without there having been any evidence or facts on the subject presented to the District Court.

14. In ignoring whether Section 8 of the Federal Register Act, 44 U. S. C., Sec. 308, was complied with as regards Presidential Proclamation 2748.

15. In ignoring the question of whether petitioners were afforded due process of law under the Constitution of the United States as regards Presidential Proclamation 2748.

16. In not deciding whether petitioners have been afforded due process of law under the Constitution of the United States or under the Constitution of the State of Illinois in the adoption of the Proclamation of the Governor of the State of Illinois.

V.

ARGUMENT.

At the outset of this argument, petitioners state that it is not their intention, in any way, to argue the merits of their case, but this argument will be confined to an argument on the reasons for granting the petition for writ of certiorari.

The opinion of the Court of Appeals for the Seventh Circuit is silent on many of the questions presented in the petition, but those questions have been in the case from the day it was filed, and the decision of some of those questions will not only determine this case but will establish binding precedents on sections of three statutes, to-wit: the Migratory Bird Treaty Act, Administrative Procedure Act and Federal Register Act, which have never heretofore been construed by this Court.

POINT I.

The last paragraph of the opinion of the Court of Appeals for the Seventh Circuit holds that no property rights of petitioners are involved in this action.

In **Cerritos Gun Club v. Hall**, 96 F. 2d 620, C. C. A. 9, a case in which the validity of regulations issued pursuant to the Migratory Bird Treaty Act, 16 U. S. C., Sec. 703 et seq., was involved, the court held that the plaintiffs, whose situation was directly analogous to that of the petitioners in the instant case, did have property rights.

In **Swan Island Club, Inc., v. Ansell**, 51 F. 2d 337, C. C. A. 4, a case which was cited in the **Cerritos Gun Club** case, the court granted an injunction to a duck club against repeated and threatened trespasses of poachers because

such repeated trespasses would virtually destroy property values.

In **Schulte v. Warren,** 218 Ill. 108, plaintiff owned a tract of land which was subject to overflow, the only value of which consisted of the right and privilege of hunting thereon, and upon which plaintiff had expended money to attract ducks. The court pointed out there was no distinction between the right to hunt and the right to fish, and the court held that such rights were property rights which would be protected by injunction.

In **Packard v. Banton,** 264 U. S. 140, 145, 68 L. Ed. 596, 608, this Court held that the right to conduct a business, which can only be carried on by government sufferance or permission, is a property right which will be protected by a court of equity.

The authorities cited by the Court of Appeals for the Seventh Circuit on the proposition that no property rights of petitioners are involved in this action are **Magner v. People,** 97 Ill. 320; **American Express Co. v. People,** 133 Ill. 649; **Geer v. Connecticut,** 161 U. S. 519, 40 L. Ed. 793.

In **Gratz v. McKee,** 270 Fed. 713, at page 720 (affirmed by this Court, 260 U. S. 127, 67 L. Ed. 167), the rationale of all three of those cases was effectively analyzed and distinguished. If the rationale of the Geer case had any vitality subsequent to the **Gratz** case, this Court at its last term in two cases eliminated whatever vitality remained. **Takahashi v. Fish and Game Commission,** ... U. S. ..., 92 L. Ed. 1096; **Toomer v. Witsell,** ... U. S. ..., 92 L. Ed. 1131.

If the opinion of the Court of Appeals for the Seventh Circuit remains unchanged, Illinois landowners and hunting club operators cannot obtain injunctive relief against

migratory waterfowl regulations, but landowners and hunting club operators in California and Virginia can.

Duck and goose hunters, as such, have previously been silenced in **Brandenburg v. Doyle**, 12 F. Supp. 342. Conservation organizations are probably likewise silenced, but not every person having a legitimate interest in the regulation of the hunting of migratory waterfowl should be silenced by the decisions of the Federal Courts.

POINT II.

An examination of the Code of Federal Regulations and the Federal Register has disclosed that the closed area established by Presidential Proclamation 2748 is the first such closed area in the United States which is not adjacent to a Federal refuge.

The regulation relating to closed areas in effect in 1947, and which had been substantially the same for more than ten years, limits the establishment of closed area to lands adjacent to Federal refuges. Proclamation 2739 (1947), Reg. 4, 12 F. R. 5269 et seq.; Proclamation 2616 (1944), Reg. 4, 9 F. R. 9873 et seq.; Proclamation 2345 (1939), Reg. 4, 4 F. R. 3621 et seq.; Proclamation 2245 (1937), Reg. 4, 2 F. R. 1355 et seq.

In Proclamation 2801, made in 1948 (13 F. R. 4413, Reg. 1.4), this regulation was changed by eliminating the requirement that the closed area be adjacent to a Federal refuge and now indicates that any area in the United States may be designated as a closed area under the Migratory Bird Treaty Act.

This Court has not had occasion to construe the Migratory Bird Treaty Act since **Missouri v. Holland**, 252 U. S. 416, 64 L. Ed. 641, decided in 1920, which case upheld its

constitutionality. Directly presented in the present case for determination are the following important Federal questions under the Migratory Bird Treaty Act:

a. Can a closed area be established under such an Act?

b. Can the standards required to be followed by said Act be applied to an area of only 20,000 acres?

c. Can a closed area be established on privately owned land not adjacent to Federal refuge?

d. Is a long continued and uniform construction of a statute by the department of government charged with its execution virtually binding on said department? **Federal Trade Commission v. Bunte Brothers**, 312 U. S. 349, 85 L. Ed. 881.

The subsequent change in former regulation 4, now found in Proclamation 2801, regulation 1.4, is a clue to the attiture of the Department of the Interior as to the validity of Presidential Proclamation 2748. By changing such regulation, has the Secretary of the Interior admitted that former regulation 4 did not permit the closure of the area involved in this case, or does the change in former regulation 4 constitute an attempt on the part of the Secretary of the Interior to assert a power he does not have and has never previously asserted under the Migratory Bird Treaty Act? **Federal Trade Commission v. Bunte Brothers**, 312 U. S. 349, 85 L. Ed. 881.

POINT III.

If foreign affairs functions of the United States are involved in the regulation of migratory waterfowl, since the Migratory Bird Treaty Act was passed pursuant to treaties with Great Britain and the United Mexican States, this

Court should determine the extent of judicial review when foreign affairs functions are involved. Cf. **C. & S. Air Lines v. Waterman S. S. Corp.**, ... U. S. ..., 92 L. Ed. 367.

POINT IV.

The Administrative Procedure Act, 5 U. S. C., Sec. 1001 et seq., is considered by many Federal practitioners to be one of the most important Congressional enactments in recent years. The interpretation to be given to such statute will vitally effect the relations of all citizens of the United States to their government.

This important piece of legislation was sponsored by the American Bar Association, and the **American Bar Association Journal** has contained scores of articles on this statute. This legislation was bitterly opposed by some agencies of the Federal Government. (Nathanson: Some Comments on the Administrative Procedure Act, 41 Ill. L. R. 368 [1946]). Certain agencies, one of which appears to be the Fish and Wildlife Service, maintain that their actions are not controlled by the Administrative Procedure Act (R. 43-44).

Some consider the Administrative Procedure Act to be a mere codification of prior laws, and others consider it to be a milestone in the control of the exercise of governmental power.

This Court has presented to it in this case certain vital and important questions which have arisen under the Administrative Procedure Act and which, if decided, will clarify some of the most important provisions thereof. A decision by this Court construing the Administrative Procedure Act will be equally helpful to private citizens and governmental agencies.

POINT V.

Under the stipulation entered into on the date when the motion for preliminary injunction was argued (R. 28-29), no evidence was offered by petitioners or respondents on the reasonableness of Presidential Proclamation 2748 so far as the scientific, biological and economic facts were concerned. On the question of reasonableness only legal questions were presented. Both the District Court and the Court of Appeals for the Seventh Circuit found and decided that Presidential Proclamation 2748 was reasonable and did not limit such findings to legal determinations as opposed to factual determinations.

This Court has in two recent cases disapproved factual determinations by lower courts which were decisive of vital rights where the crucial facts were not developed or where there was an indefinite factual situation. **Kennedy v. Silas Mason Co.**, 334 U. S. ..., 92 L. Ed. 989; **Price v. Johnston**, 334 U. S. ..., 92 L. Ed. 993.

This Court's power of supervision should be exercised to correct the broadening of the issue of "reasonableness" by the lower courts in this case in view of the limiting stipulation.

POINT VI.

This Court has never passed upon Section 8 of the Federal Register Act, 44 U. S. C., Sec. 308, which requires publication of notice in the Federal Register of proposed administrative action. Said section further provides that not less than fifteen days shall elapse from the publication of the notice until the opportunity to be heard terminates unless a shorter period is reasonable.

In this case no time was set for the termination of the opportunity to be heard (see Appendix "B").

It is significant to note that since petitioners filed their action in November, 1947, the Secretary of the Interior has

been careful to comply with Section 8 of the Federal Register Act by stating a definite time for termination of the opportunity to be heard. See 13 F. R. 1191, March 5, 1948, Notice of Proposed Rule Making.

Noncompliance with Section 8 of the Federal Register Act is a violation of the Administrative Procedure Act, and the two statutes should be construed together.

POINT VII.

Notice of the proposed Presidential Proclamation 2748 was given by publication in the Federal Register (see Appendix "B"). The hearing granted to petitioners on September 30, 1947, was held five days subsequent to September 25, 1947, the date when the Secretary of the Interior signed the Proclamation. Said notice also provided that Albert M. Day, Director of the Fish and Wildlife Service, was the person to receive information submitted in connection with the proposed closure order. Day heard only part of the evidence submitted by petitioners, and the transcript of the evidence was not written up until after the President signed Proclamation 2748 (R. 50, 54, 13). It is submitted that under **Morgan v. U. S.**, 298 U. S. 468, 80 L. Ed. 1288; and **Coe v. Armour Fertilizer Works**, 237 U. S. 413, 59 L. Ed. 1027, these petitioners have not been afforded due process of law under the Fifth Amendment to the Constitution of the United States. Hearings before administrative agencies are not supposed to confirm previous administrative action or to place the stamp of legality on a prejudged situation.

Petitioners were given no notice or opportunity to be heard concerning the Proclamation of the Governor of the State of Illinois (R. 49, 51, 52). Under the two above cited cases of this Court, petitioners have been denied due process of law under the Fourteenth Amendment to the Constitution of the United States. By reason of decisions of

the Supreme Court of Illinois, **Grattan v. Ahlberg Bearing Co.**, 373 Ill. 455; **Benton v. Marr**, 364 Ill. 628, petitioners have not been afforded due process of law under Article II, Section 2, of the Constitution of the State of Illinois.

The only portion of the opinion of the Court of Appeals for the Seventh Circuit which mentions constitutionality holds that Section 3-D of the Game Code of Illinois, Ill. Rev. Stat. 1947, Chap. 61, Sec. 137, did not violate any provisions of the United States and Illinois Constitutions. The question of the constitutionality of said section was not before the Court of Appeals or the lower court; otherwise a three-judge court would have been mandatory at the time of the hearing on the motion for preliminary injunction.

This Court has often commented on the requirements of "procedural due process," and such questions are specifically before it in this case.

CONCLUSION.

The judgments of the Court of Appeals for the Seventh Circuit and the District Court involve several important and new questions never before decided by this Court and further involve the application of principles heretofore established by this Court. Such determinations and questions merit the consideration of this Court.

Respectfully submitted,

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APPENDIX "A."

Federal Register Volume 12 No. 151, August 2, 1947,
Pages 5269, 5271-3

PROCLAMATION 2739

Amendments of Regulations Relating to
Migratory Birds and Game Mammals

By the President of the United States of America

A Proclamation

Whereas the Acting Secretary of the Interior has adopted, after notice and public procedure pursuant to section 4 of the Administrative Procedure Act of June 11, 1946 (Pub. Law No. 404—79th Cong.), and has submitted to me for approval the following amendments of the regulations approved by Proclamation No. 2616 of July 27, 1944, as amended, relating to migratory birds and game mammals included in the terms of the Convention between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916, and the Convention between the United States and the United Mexican States for the protection of migratory birds and certain game mammals concluded February 7, 1936:

Amendments of Migratory Bird Treaty Act Regulations Adopted by the Secretary of the Interior

By virtue of and pursuant to the Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755), and Reorganization Plan II (53 Stat. 1431), and in accordance with the provisions of the Administrative Procedure Act of June 11, 1946 (Pub. Law No. 404—79th Cong.), I, Oscar L. Chapman, Acting Secretary of the Interior, having due regard to the zones

of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of migratory birds included in the terms of the Convention between the United States and Great Britain for the protection of migratory birds, concluded August 16, 1916, and the Convention between the United States and the United Mexican States for the protection of migratory birds and game mammals, concluded February 7, 1936, have determined when, to what extent, and by what means it is compatible with the terms of the said Act and conventions to allow the hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, exportation and importation of such birds and parts thereof and their nests and eggs, and in accordance with such determinations, do hereby amend as follows the regulations approved by Proclamation No. 2616 of July 27, 1944, as last amended by Proclamation No. 2699 of August 8, 1946, and as so amended do hereby adopt such regulations as suitable regulations, permitting and governing the hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, exportation, and importation of such migratory birds and parts, nests, and eggs thereof:

* * * * * * *

Regulation 4, "Open Seasons on and Possession of Certain Migratory Game Birds," is amended to read as follows:

* * * * * * *

Nothing herein shall be deemed to permit the taking of migratory birds on any reservation or sanctuary established under the Migratory Bird Conservation Act of February 18, 1929 (45 Stat. 1222), or on any area of the United States set aside under any other law, proclamation, or Executive order for use as a bird, game or other wildlife reservation, breeding ground, or refuge except so far as

may be permitted by the Secretary of the Interior under existing law. or on any area adjacent to any such refuge when such area is designated as a closed area under the Migratory Bird Treaty Act.

Waterfowl and Coot. The open season on waterfowl and coot (except wood ducks in Arizona, Colorado, Kansas, Massachusetts, Nebraska, Nevada, New Jersey, North Dakota, Utah, West Virginia and Wyoming; snow geese in Beaverhead, Gallatin, and Madison Counties in Montana, in Colorado, Idaho and Wyoming, and snow geese and brant in States bordering on the Atlantic Ocean; Ross' geese; and swans) in the several States, Alaska and Puerto Rico shall be as follows, both dates inclusive:

* * * * * * *

Illinois, Missouri and West Virginia, November 4 to December 3.

* * * * * * *

Regulation 5, "Daily Bag and Possession Limits on Certain Migratory Game Birds," is amended to read as follows:

A person may take in any one day during the open seasons prescribed therefor in regulation 4 not to exceed the following numbers of migratory game birds, which numbers shall include all birds taken by any other person who for hire accompanies or assists him in taking such birds. When so taken, such birds may be possessed in the number hereinafter specified, except that no person on the opening day of the season may possess any migratory game birds in excess of the daily limits herein prescribed.

* * * * * * *

Geese and brant (except snow geese in Beaverhead, Gallatin and Madison Counties in Montana, in Colorado, Idaho, and Wyoming, and snow geese and brant in States

bordering on the Atlantic Ocean; and Ross' geese anywhere), as follows:

In Washington, Oregon and California 5, including in such limit any combination not exceeding 2 of Canada geese (including Hutchins or cackling geese), white-fronted geese and brant.

In Alaska, Puerto Rico, Idaho, Utah, Arizona and Nevada 4, including in such limit not more than 2 Canada geese (including Hutchins or cackling geese), or 2 white-fronted geese or 1 of each.

Elsewhere than in the above States 4, including in such limit either 1 Canada goose (including Hutchins or cackling geese) or 1 white-fronted goose.

Any person may possess not more than the above bag limits of geese or brant.

In view of the fact that the hunting season on a number of migratory birds normally opens on September 1, it has been determined that these amendments shall become effective August 31, 1947.

In Witness Whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be fixed, this 29th day of July, 1947.

Oscar L. Chapman,
(Seal) Acting Secretary of the Interior.

And Whereas upon consideration it appears that approval of the foregoing amendments will effectuate the purposes of the aforesaid Migratory Bird Treaty Act:

Now, Therefore, I, Harry S. Truman, President of the United States of America, under and by virtue of the authority vested in me by section 3 of the said Migratory

Bird Treaty Act of July 3, 1918, do hereby approve and proclaim the foregoing amendments.

In Witness Whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this 31st day of
(Seal) July in the year of our Lord nineteen hundred and forty-seven, and of the Independence of the United States of America the one hundred and seventy-second.

Harry S. Truman.

By the President:

G. C. Marshall,
Secretary of State.

(F. R. Doc. 47-7309; Filed, July 31, 1947; 4:26 p. m.)

APPENDIX "B."

Federal Register Volume 12 No. 184, September 19, 1947, Pages 6273-4

Proposed Rule Making

Department of the Interior

Office of the Secretary

(50 CFR, Part 1)

Protection of Migratory Birds and Certain Game Mammals

Notice of Intention to Adopt Amendments

Pursuant to section 4 (a) of the Administrative Procedure Act, approved June 11, 1946 (Public Law 404, 79th Cong.), and the authority contained in section 3 of the Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755, 16 U. S. C. 704), as amended, notice is hereby given that the Secretary of the Interior intends to take the following action:

Adopt an amendment to the regulations for the protection of migratory birds and certain game mammals as last amended and approved by Proclamation No. 2739, July 1, 1947 (12 F. R. 5269), which will prohibit the hunting, taking, capture, killing and possession of geese in Alexander County, Illinois, in the immediate vicinity of Horseshoe Lake.

The foregoing regulations are to be effective beginning November 3, 1947, and to continue in effect thereafter until further notice.

Interested persons are hereby given an opportunity to participate in preparing the regulations for issuance as set

forth by submitting their views, data, or arguments in writing to Albert M. Day, Director, Fish and Wildlife Service, Washington, D. C.

Oscar L. Chapman,
Under Secretary of the Interior.

September 16, 1947.

(F. R. Doc. 47-8529; Filed Sept. 18, 1947; 8:47 a. m.)

APPENDIX "C."

Federal Register Volume 12 No. 194, October 3, 1947,
Pages 6521, 6523

PROCLAMATION 2748

Closed Area Under the Migratory Bird
Treaty Act, Illinois

By the President of the United States of America

A Proclamation

Whereas the Secretary of the Interior has submitted to me for approval the following regulation adopted by him after notice and public procedure pursuant to section 4 of the Administrative Procedure Act of June 11, 1946 (60 Stat. 238), under authority of the Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755, 16 U. S. C. 704), and Reorganization Plan No. II (53 Stat. 1431):

Regulation Designating as Closed Area Certain Lands and Waters in Alexander County, Illinois

By virtue of and pursuant to the authority contained in section 3 of the Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755, 16 U. S. C. 704), Reorganization Plan No. II (53 Stat. 1431), and in accordance with the provisions of section 4 of the Administrative Procedure Act of June 11, 1946 (60 Stat. 238), I, J. A. Krug, Secretary of the Interior, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of flight of the migratory birds herein referred to and included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds, concluded August 16, 1916, and between the United States and the United Mexican States for the protection of migratory birds and game mammals, concluded February 7, 1936, and in consideration of the obligation imposed by said treaties of insuring the preservation of said migratory birds, do hereby designate as

closed area, effective November 3, 1947, in or on which pursuing, hunting, taking, capturing, or killing of all species of wild geese, or attempting to take, capture, or kill such wild geese is not permitted, all that area of land and water situate in Alexander County, Illinois, within the following described exterior boundary:

(Description omitted.)

In Witness Whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed this 25th day of September, 1947.

J. A. Krug,
(Seal) Secretary of the Interior.

And Whereas upon consideration it appears that the foregoing regulation will tend to effectuate the purposes of the aforesaid Migratory Bird Treaty Act of July 3, 1918:

Now, Therefore, I, Harry S. Truman, President of the United States of America, under and by virtue of the authority vested in me by the aforesaid Migratory Bird Treaty Act of July 3, 1918, do hereby approve and proclaim the foregoing regulation of the Secretary of the Interior.

In Witness Whereof I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this 1st day of
(Seal) October in the year of our Lord nineteen hundred and forty-seven, and of the Independence of the United States of America the one hundred and seventy-second.

Harry S. Truman.

By the President:

Robert A. Lovett,
Acting Secretary of State.

(F. R. Doc. 47-9006; Filed Oct. 2, 1947; 12:12 p. m.)

APPENDIX "D."

State of Illinois

Executive Department

PROCLAMATION.

Whereas, the conservation of all our natural resources, and the protection and restoration of those which are renewable become increasingly important to the citizens of Illinois with each passing year, and

Whereas, the wild geese of Illinois are in danger of extermination, and

Whereas, the wild geese are highly valuable for their contribution to the beauties of nature and the enjoyment of outdoor life, and

Whereas, the destruction of wild geese occurs mainly in the vicinity of Horseshoe Lake in Alexander County, Illinois, and

Whereas, the continuation of the annual migration of this bird through Illinois is dependent upon the protection of wild geese in part of Alexander County, and

Whereas, the State of Illinois is obligated by law to insure the safety and preservation of migratory waterfowl, now, therefore, I, Dwight H. Green, Governor of the State of Illinois, do hereby designate as a *closed area*, in or on which pursuing, hunting, taking, capturing or killing of all species of wild geese, or attempting to take, capture or kill said wild geese is not permitted, all that area of land and water situated in Alexander County, Illinois, within the following described exterior boundary:

(Description omitted.)

In Witness Whereof, I have hereunto set my hand and caused the Great Seal of the State of Illinois to be affixed.

Done at the Capitol in the City of Springfield, this first day of October, in the Year of Our Lord one thousand nine hundred and forty-seven, and of the State of Illinois the one hundred and twenty-ninth.

(Seal of the State of Illinois)

Dwight H. Green,
Governor.

By the Governor.

"Filed
Executive Department
Oct 2—1947
Edward J. Barrett
Secretary of State"

Edward J. Barrett
Secretary of State

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	10

CITATIONS

Cases:

Bailey v. *Holland*, 126 F. 2d 317	8, 9
Carey v. *South Dakota*, 250 U. S. 118	9
Cochrane v. *United States*, 92 F. 2d 623	8
United States v. *Carmack*, 329 U. S. 230	9

Statutes:

Administrative Procedure Act, 5 U. S. C. 1001-1011	5
Sec. 10(e)	6, 7
Migratory Bird Treaty Act of July 3, 1918, 40 Stat. 755, as amended, 16 U. S. C. secs. 703-711	3
Sec. 2	7
Sec. 3	2, 8

Miscellaneous:

Proclamation 2748 (12 F.R. 6521)	3, 4, 5
Proclamation 2801 (13 F.R. 4411)	7
Sen. Doc. No. 248, 79th Cong. 2d Sess. p. 230	7

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 289

DAVID V. LANSDEN, ET AL., PETITIONERS

v.

WILLIAM W. HART, as United States Attorney for the Eastern District of Illinois, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS HART, MARTIN, AND SJOSTROM IN OPPOSITION

OPINIONS BELOW

The oral opinion of the district court (R. 55-59) is not reported. The opinion of the circuit court of appeals (R. 83-87) is reported in 168 F. 2d 409.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1948 (R. 87-88). Petition for rehearing was denied June 23, 1948 (R. 107). The petition for

a writ of certiorari was filed on September 21, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254.

QUESTION PRESENTED

Whether the Migratory Bird Treaty Act authorized the prohibition of hunting geese in an area of some 20,000 acres adjacent to a State Game preserve.

STATUTE INVOLVED

The Migratory Bird Treaty Act of July 3, 1918, Sec. 3, 40 Stat. 755, as amended, 16 U. S. C. sec. 704, provides:

> Subject to the provisions and in order to carry out the purposes of the conventions, referred to in section 703 of this title, the Secretary of the Interior is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President.

STATEMENT

This action was brought to enjoin various officials of the Federal and State governments from enforcing certain regulations relating to migratory birds. The complaint was filed on November 6, 1947 (R. 3). A preliminary injunction was sought and a hearing was held on November 13, 1947. On the same day a motion to dismiss was filed (R. 23-24). At the conclusion of the hearing, the trial court rendered its opinion stating the reasons for the denial of the plaintiffs' motion for a preliminary injunction (R. 55-59), and an order denying the motion was entered the same day (R. 64-65).

The facts as they appear from the pleadings, the stipulations of the parties and the findings of the trial court may be summarized as follows:

A game preserve has been established by the State of Illinois at Horse Shoe Lake in Alexander County. On October 1, 1947, the President, pursuant to the Migratory Bird Treaty Act of July 3, 1918, as amended, 16 U. S. C. secs. 703-711, signed Proclamation 2748, 12 F.R. 6521, which prohibited hunting of all species of wild geese in a designated area surrounding the Horse Shoe Lake preserve. At the same time, a similar proclamation was signed by the Governor of Illinois. The various plaintiffs own or lease farms included within the closed area upon which hunting clubs are operated or hunting facilities are leased (R. 6-11).

The theory of the complaint was that Procla-

mation 2748 and the proclamation of the Governor of Illinois were invalid and that the plaintiffs would be irreparably damaged by enforcement thereof (R. 15-17). The federal officials named as defendants were William W. Hart, United States Attorney, and John M. Martin and Rae O. Sjostrom, both of whom are game management agents of the Fish and Wildlife Service of the Department of the Interior. The claims of invalidity of Proclamation 2748 were of two types: first, that it was arbitrary and capricious and not in accord with the Migratory Bird Treaty Act (R. 16), and second, that the procedure by which it was adopted did not conform to the Administrative Procedure Act and the Federal Register Act (R. 15-16).

The evidence taken at the hearing related to the circumstances under which Proclamation 2748 was issued, the hearings had in that connection and similar matters. The court found the facts to be as follows:

Prior to September 19, 1947, many conferences and hearings were held relating to migratory waterfowl, including geese, and "in particular with respect to the concentration of such geese" near Horse Shoe Lake. On September 19, 1947, a notice was published in the Federal Register of an intention to adopt an amendment to the regulations which would prohibit the hunting of geese in the vicinity of Horse Shoe Lake after November 3,

1947. Prior to September 30, 1947, a petition was presented by an attorney representing some of the plaintiffs, setting forth their views concerning regulations as to geese in Alexander County. On September 30, 1947, an additional hearing was held at Chicago at which some of the plaintiffs were present. Subsequent to this hearing, the Secretary of the Interior was advised of the evidence presented at the hearing. Following receipt of all the evidence and data, Proclamation 2748 was presented to the President, who signed it on October 1, 1947. On October 3, 1947, it was published in the Federal Register. (Fdgs. 4, 5, 6; R. 61-62.)

On the basis of these facts, the trial court found that the provisions of the Administrative Procedure Act, 5 U. S. C. 1001-1011, are inapplicable to Proclamation 2748, 12 F. R. 6521; that the Secretary of the Interior and the President had complied with the provisions of that Act in issuing the Proclamation; and that the provisions of Proclamation 2748 are not arbitrary or capricious but are reasonable and proper (Fdgs. 7, 8, 9; R. 62-63). For these reasons, the motion for a preliminary injunction was denied. The circuit court of appeals affirmed, holding that both the Federal and the State Proclamations were valid (R. 83-87).

ARGUMENT

Petitioners assert that some seventeen questions are presented in this case (Pet. 11-14). However,

analysis will show that most, if not all, of these matters are either irrelevant or have now become moot.

1. The hunting of geese in the area in question was prohibited by both federal and state action; hence, to establish their case, petitioners must show that both proclamations were invalid. The claim that the Proclamation of the Governor of the State of Illinois violated the State constitution (Pet. 14, 32) obviously does not present a question for review by this Court. Petitioners' further assertion that such proclamation is invalid because they have been denied due process of law under the Fourteenth Amendment to the Federal Constitution is unsupported by any authority indicating that a state is required to give notice and hearing to all persons interested before adopting regulations relating to wild game.

2. Even if some substantial question as to the State Proclamation were presented, petitioners' attack on the Federal Proclamation lacks merit. The questions whether petitioners have property rights giving them standing to sue (Pet. 11-12, 14-15, 17, 25-26) and whether the Administrative Procedure Act, 5 U. S. C. sec. 1009, gives them standing (Pet. 13, 29) are not presented here since the decision below did not rest on a conclusion that petitioners had no standing to sue. Petitioners refer to questions whether the Federal Proclamation was invalid because the procedure under which

it was adopted violated the Administrative Procedure Act and the Federal Register Act (Pet. 13-14, 16-17, 28-29, 30-31). But the Migratory Bird Act Regulations are re-issued annually (R. 11-12) and, as petitioners recognize (Pet., p. 6), Proclamation 2801, 13 F. R. 4411, which governs the matter for the current year, was adopted after notice and public procedure pursuant to the Administrative Procedure Act. Since petitioners seek an injunction against enforcement of the regulation in the area in question, whether the proclamation prohibiting hunting there in 1947 was adopted under proper procedure is now a moot question.[1]

3. There remains the single question whether the closing of the area in question was authorized under the Migratory Bird Treaty Act. The Act does not permit hunting of migratory birds except as forbidden by regulations. On the contrary, section 2 of the Act (16 U. S. C. 703) prohibits all hunt-

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[1] Petitioners' attack on the procedure by which the 1947 regulations were adopted sacrifices substance to form. As the findings of the trial court quoted by the court below (R. 84-85) show, hearings were held after notice to petitioners. The attack thereon is based on the fact that the Secretary of the Interior signed the regulation on September 25, 1947 (Pet. 8). But this ignores the fact that the definitive step of submitting the Proclamation to the President was not taken until after the hearing (R. 62). If error at all, the physical signing on the earlier date was clearly non-prejudicial. See Section 10(e) of Administrative Procedure Act, 5 U. S. C. 1009; Sen. Doc. No. 248, 79th Cong. 2d Sess. p. 230.

ing except as permitted by regulations.[2] And section 3 of the Act, 16 U. S. C. sec. 704, authorizes the Secretary of the Interior under regulations to be approved by the President "to determine when, to what extent, if at all, and by what means" hunting, etc., shall be allowed. Petitioners argue that no permanently closed area can be established; that an area as small as 20,000 acres cannot be closed when hunting is permitted in the rest of the State; and that a closed area cannot be established on privately owned land not adjacent to a Federal refuge (Pet. 12, 15-16, 27-28). But the Act contains no such limitations. On the contrary, the Secretary is given broad discretion to determine when hunting will be permitted "if at all". This obviously includes the power to close permanently certain areas where birds congregate while permitting hunting elsewhere. *Bailey* v. *Holland,* 126 F. 2d 317 (C. C. A. 4). The court below stated that both proclamations were "enforcement measures that were neither unreasonable nor capricious but were justified by facts developed by extensive study and investigation made by Federal and State officials charged with conservations of migratory birds" (R. 86).[3] Petitioners' claim of long-standing ad-

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[2] Petitioners do not challenge the constitutionality of the Act. See *Cochrane* v. *United States,* 92 F. 2d 623 (C. C. A. 7); *Bailey* v. *Holland,* 126 F. 2d 317 (C. C. A. 4).

[3] Petitioners complain (Pet. pp. 17-18, 24, 30) of this statement because of the stipulation at the hearing on motion for preliminary injunction (R. 28-29). But petitioners contended that the Proclamation was arbitrary or capricious (R. 58,

ministrative construction (Pet. 27-28) is based on the fact that this was the first instance where a closed area has been established adjacent to a state game refuge rather than federal refuge. But the assumption upon which the argument is based—the fact that such authority has not previously been exercised means that it does not exist—is fallacious. There is no administrative construction that when the circumstances make it desirable, the Federal Government must take over a state refuge in order to establish a closed area surrounding it. On the contrary, the Act recognizes that state interests in such matters continue subject to paramount federal power. *Carey* v. *South Dakota,* 250 U. S. 118.

71, cf. R. 97). It was in response to this argument that both courts below concluded that the proclamation was a reasonable exercise of administratrive discretion (R. 63, 86). Petitioners apparently have the notion that the court may review the reasonableness of the regulation with reference to scientific, biological and economic facts (Pet. p. 30). But the reasonableness of the regulation in this sense, i.e., the wisdom of the determination is not subject to judicial review. *Bailey* v. *Holland,* 126 F. 2d 317 (C. C. A. 4); Cf. *United States* v. *Carmack,* 329 U. S. 230.

CONCLUSION

The decision of the court below is correct and presents no conflict or question which should be decided by this Court.

Respectfully,

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